INTERIOR BOARD OF INDIAN APPEALS

Alan and Bernice Mast v. Aberdeen Area Director, Bureau of Indian Affairs

19 IBIA 96 (11/28/1990)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ALAN AND BERNICE MAST
v.
ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-82-A Decided November 28, 1990

Appeal from a cancellation of 10 farming and grazing leases on the Winnebago Indian Reservation.

Affirmed.

1. Indians: Leases and Permits: Cancellation or Revocation

Where a lessee of Indian trust land has been given ample opportunity to cure a breach of his lease and has failed to do so, 25 CFR 162.14 does not require that he be given yet another opportunity.

APPEARANCES: Matt Samuelson, Esq., Pender, Nebraska, for appellant; Mariana R. Shulstad, Esq., Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Alan and Bernice Mast seek review of a March 14, 1990, decision of the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), cancelling 10 farming and grazing leases of Indian trust land on the Winnebago Indian Reservation, Nebraska. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

The leases at issue in this appeal were issued to Alan Mast by the Acting Superintendent, Winnebago Agency, BIA, on January 26, 1988. 1/

1/ The allotments covered by the leases are: (1) L-16, Henry Johnson; (2) L-21, Otter Smith; (3) 154, Good Old Man; (4) L-158, Baldy Brown; (5) 189, Andrew Jackson English; (6) 448, Julia Little Chief; (7) 892, Henry Blackhawk; (8) 910, Thomas Swallow; (9) 985, Maggie Hill; and (10) T.A., Susan Bigbear.

Bernice Mast is not shown as lessee on any of the leases.

Six were for a 3-year term, beginning on March 1, 1988, and ending on February 28, 1991. Four were for a 5-year term, beginning on March 1, 1988, and ending on February 28, 1993.

By letter of September 24, 1987, the Superintendent informed Mast that he was the successful bidder for the parcels and advised him that by October 26, 1987, he should (1) sign and return the leases, (2) obtain a surety bond or letter of credit, (3) sign the farm plans, and (4) pay lease fees in the amount of $1,030. When Mast had not complied with these requirements by January 6, 1988, the Superintendent notified him that, if he did not comply within 5 days, the parcels would be leased to someone else. Mast produced a letter of credit on January 15, 1988; and apparently complied with the other requirements as well, enabling the Superintendent to approve the leases on January 26, 1988.

On September 28, 1988, the Superintendent advised Mast that his letter of credit had expired and that he must provide a surety bond or letter of credit in the amount of $22,975 within 30 days or face cancellation of his leases. Appellant did not produce either document. A handwritten note dated October 29, 1988, signed by Mast, indicates that he was seeking an extension of time in which to submit a letter of credit. No response to the note appears in the record.

On a number of occasions during 1988 and 1989, Mast was found to be in violation of the leases because of overgrazing and failure to control noxious weeds. On June 23, 1988, he was assessed $1260 in liquidated damages for overgrazing, which he paid in August 1988.

Mast's rental payment for 1989, which was due on February 20, 1989, was not paid until April 17, 1989. He was assessed a late payment charge of $200. The record does not show whether the charge was paid.

On March 1, 1989, when Mast's 1989 rental payment was already overdue, the First National Bank of Walthill (bank) sent BIA a notice stating: "RE: Alan Mast rent, First National Bank will advance 1989 land rent." BIA construed this document as a letter of credit, albeit a short-lived one, expiring when Mast made his 1989 rental payment on April 17, 1989.

On November 8, 1989, the Superintendent again demanded that Mast produce a surety bond or letter of credit, this time by December 8, 1989. In mid-November 1989, according to Mast's filings with the Board, he attempted to secure a letter of credit from the bank, but was informed that the bank would not issue him a letter of credit unless he first obtained a loan from the Farmers Home Administration (FmHA). He filled out an application for a FmHA loan on December 13, 1989. The administrative record includes a handwritten note dated December 5, 1989, signed by Mast, indicating that the bank would have a letter of credit ready the

_____

2/ This letter lists 16 leases, including the 10 at issue in this appeal.

following week and that a BIA employee had agreed to grant him an extension until then.

On January 16, 1990, Mast had still not submitted a letter of credit. On that date, the Superintendent wrote to him stating that unless he had submitted a surety bond or letter of credit within 10 days of his receipt of the Superintendent's letter, his leases would be cancelled. Mast received the letter on January 17, 1990. On January 26, 1990, Bernice Mast called BIA to report that the FmHA would not consider Mast's loan application until January 30, 1990. On January 29, 1990, the Superintendent cancelled the 10 leases at issue in this appeal.

Appellants appealed to the Area Director, who affirmed the lease cancellations on March 14, 1990.

Appellants' notice of appeal from the Area Director's decision was received by the Board on April 27, 1990. Both appellants and the Area Director filed briefs.

Discussion and Conclusions

Appellants argue that Mast's failure to obtain a letter of credit was beyond his control because the letter was dependent upon the FmHA's approval of his loan request. They contend that Mast would have been able to submit a letter of credit on or after January 31, 1990, and that, under 25 CFR 162.14, he should have been given an opportunity to do so. Further, appellants argue that BIA improperly considered Mast's prior performance under the leases in making the cancellation determination.

The Area Director argues that 25 CFR 162.14 did not require the Superintendent to offer Mast an opportunity to cure his violation. He further argues that the Superintendent reasonably considered Mast's history of lease violations and notes, inter alia, that Mast had been in violation of 25 CFR 162.5(c) during most of his lease terms by failing to have on deposit a surety bond or letter of credit satisfactory to BIA.

3/ 25 CFR 162.5(c) provides:

"Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing:

"(1) Not less than one year's rental unless the lease contract provides that the annual rental shall be paid in advance.

"(2) The estimated construction cost of any improvement to be placed on the land by the lessee.

"(3) An amount estimated to be adequate to insure compliance with any additional contractual obligations."

This provision, along with 25 CFR Part 162 in its entirety, is incorporated by reference into Mast's leases.

[1] 25 CFR 162.14 provides:

> Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. The surety or sureties shall be sent a copy of each such notice. If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach.

This section "contemplates that leases of Indian lands will not be canceled because of breaches that may readily be cured." Jack Dean Franks v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 231, 234 (1985). At the same time, it contemplates that, where BIA reasonably concludes that a breach cannot be cured, a lessee need not be given any further time to cure it. Id. In considering whether a breach may be cured, it is entirely appropriate for BIA to take into account the lessee's past performance under the lease, particularly where the breach at issue is one of long duration or frequent recurrence. See Downtown Properties, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 62, 67 (1984); Jack Dean Franks, supra. See also Earle C. Strebe v. Assistant Secretary--Indian Affairs (Operations), 16 IBIA 62 (1988).

Mast had been aware since at least October 1988 that his failure to maintain a letter of credit was a breach of his leases. He was given more than ample opportunity prior to January 29, 1990, to correct the breach but failed to do so. His dilatory habits and tendency to violate the leases in other ways were also readily apparent by January 1990. Further, Mast had a history of seeking extensions of time in which to submit a letter of credit and then failing to submit it. 4/ Given his past performance in this regard, the Superintendent reasonably ignored Bernice Mast's January 26, 1990, apparent attempt to secure another extension of time.

Under the circumstances present here, BIA was not required to find specifically that Mast's breach could not be cured within a reasonable time, or to give him a further opportunity to cure the breach. See Jack Dean Franks, supra.

4/ The Board notes that Mast was less than forthright in his Dec. 5, 1989, note to BIA, in which he indicated that the bank would have a letter of credit ready for him the following week. In fact, as appellants admit in their filings with the Board, Mast knew at that time that the bank would not give him a letter of credit until he obtained a FmHA loan, a loan for which he had not even applied on Dec. 5, 1989.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Aberdeen Area Director's March 14, 1990, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

_____
Kathryn A. Lynn
Chief Administrative Judge